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93-124

Supreme Court, U.S.
FILED
JUL 19 1993
OFFICE OF THE CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER 1993

PETER MICK AND DONALD BECK PETITIONER

VERSUS

RESOLUTION TRUST CORPORATION RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES THIRD CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

PETER R. MICK
PRO SE
4 STONEY BROOK TRAIL
KINNELON, NJ 07405
201-838-1725

DONALD C. BECK
PRO SE
18 WOOD GLEN WAY
PARSIPPANY, NJ 07005
201-334-7524

QUESTION

The Resolution Trust Corporation, a congressionally chartered agency, is bound by agreements that are written on the face of a mortgage[1]. Can it use an unwritten power to not honor these agreements while forcing the Appellants to honor their obligations? The agreements which the RTC is not honoring induced the Appellants to make the purchase money mortgage. Can the Federal Courts allow the RTC to use this unwritten power?

The RTC did use, and the 3rd Circuit Court of Appeals did allow the RTC to use, an unwritten power and therefore has the RTC with the support of the Federal Courts violated the Constitutional rights and rights given by law and doctrine of the

Note[1] Fannie Mae, a Congressionally chartered organization published these forms and millions have been executed.

Appellants by:

a) allowing the Federal Government to interfere with intra state commerce in a way denied even to the States per Article 1 Section 10 of the Constitution. "No State shall pass any law that impairs the obligation of contracts."?

b) depriving them of property, the agreements removed from the mortgage, protected by the 5th amendment?

c) depriving them of the liberty, to contract without government interference as allowed by the 5th amendment.

d) modifying 12 USC 1823(e) to allow the courts a choice to either test agreements to 12 USC 1823 (e) or to remove them because 1823 (e) would find them valid, and legally binding against the RTC?

e) deciding contrary to the principals of the following cases of the Supreme Court and the 7th Circuit?

- D'Denche, Duhme & Co. Inc. v. FDIC, 315 U.S.447, 62 S.Ct. 676, 86 L.Ed. 956 (1942).
- Langley v. FDIC, 484 U.S.86,108 S.Ct.396,400, 98 L.Ed.2d 340 (1987)
- Howell v. Continental Credit Corp., 655 F2d 743 (7th Cir. 1981)

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IN THE SUPREME COURT OF THE UNITED STATES

1993

Peter Mick and Donald Beck — PETITIONER

V.

Resolution Trust Corporation — RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE 3RD CIRCUIT COURT OF APPEALS

The Petitioners Peter Mick and Donald Beck respectfully pray that a writ of certiorari issue to review the judgement of the United States 3rd Circuit Court of Appeals, entered on April 20, 1993.

OPINIONS BELOW

On April 20, 1993 the 3rd Circuit

Court of Appeals affirmed the judgement of the United States District Court in the district of New Jersey. The District Court issued their letter opinion and order on September 1, 1992.

JURISDICTION

The Judgement Order of the 3rd Circuit Court of Appeals was issued on April 20, 1993. This Court has jurisdiction per 28 U.S.C. 1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUES INVOLVED

The Constitution of the United States of America, Article 1, Section 10-1:

No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money, emit bills of credit, make anything but gold and silver coin a tender in payment of

debts: pass any bill of attainder, ex post facto law or law impairing the obligation or contracts, or grant any title of nobility.

The Constitution of the United states of America, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life and limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Statute 12 U.S.C. 1823(e)

No agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it under this section or section 1821 or this title, either as security for a loan or by purchase or as receiver of any insured depositor institution, shall be valid against the corporation unless such agreement-

(1) is in writing,

(2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obliger, contemporaneously with the acquisition of the asset by the depository institution,

(3) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board of committee, and

(4) has been, continuously from the time of its execution, an official record of the depository institution.

STATEMENT OF THE CASE

US Capital Corporation, the developer of the Enclave a 27 floor building on the boardwalk in Atlantic City that was being operated as a hotel, sold two hotel units to the Appellants and provided mortgage financing for same. In April of 1986, prior to purchase, the Appellants were given tours of the already operating Hotel and presented with Brochures, a public offering statement, a master deed, a Daily Room Rate Schedule and other information.

The Closing took place on June 25, 1986. The mortgage, composed of FNMA/FHLMC forms, which was prepared by US Capital Corporation was a bilateral obligation which contained agreements

representing that there were no restrictions on the right of a unit owner to rent or lease his unit. Therefore the units could be rented on a daily basis as in the already operating hotel program. Another agreement contained in the mortgage stated that the Lender or his successors and assigns must advise the Appellants that the Appellants have the right to assert any defense to acceleration and foreclosure. Also US Capital leased back the units for three years and they indicated that this would allow the hotel operation to mature, therefore reducing the risk to the appellants. In addition to the closing costs the Appellants put 20% down on the purchase money mortgage.

Five days after the closing the mortgage together with the mortgage note was assigned, without the knowledge of the Appellants, to Irving Savings and Loan

which subsequently was taken over by the Resolution Trust Corporation.

In October of 1988 US Capital Corporation, the Lender, defaulted on the lease and the Appellants notified them that the mortgage payments would be withheld until the lease was up to date. In February of 1989 the mortgage servicer, Mellon Financial Services, sent the Appellants notice that acceleration and foreclosure would occur if the mortgage was not up to date. Mellon abided by the agreement in the mortgage and in this same notice they advised the Appellants of the Appellants right to assert any defense to acceleration and foreclosure. In March of 1989 the Appellants filed suit against US Capital, its affiliates and Mellon Financial Services because of the breach of the leaseback.

It later became apparent that a fraud was perpetrated by US Capital Corporation,

on the Appellants, concerning the allowed use of the property. Although when the Appellants first saw the Enclave it was an operating hotel, it was, unbeknownst to the Appellants, operating illegally. US Capital had failed to apply for the proper land use compliance certificate in their construction plan that was submitted to Atlantic City and therefore Atlantic City denied the Enclave a Mercantile license and forced the hotel operation to close down. This change in status allowed the units to be rented for periods of three months minimum rather than overnight and short term as in the hotel program. Visitors to Atlantic City desire short term rentals and that is why the Appellants purchased units that supposedly could be in the operating hotel program.

On March 1, 1990 Irving Saving and Loan, who until this time was unknown to the Appellants, filed foreclosure suits

on the units. On July 13, 1990 the Appellants filed their answer. The mortgage itself and the previous notice from Mellon Financial Services confirmed that the Appellants could assert any defense to acceleration and foreclosure. The defenses the Appellants wished to assert were; fraud in the inducement, construction defects and breach of contract.

On November 13, 1990 US Capital Corporation filed for bankruptcy. On January 17, 1991 the RTC became receiver for Irving. A meeting was held at Irving Saving and Loan and the RTC stated that they were immune to any and all defenses, independent of what was written in the mortgage documents. On November 14, 1991 the RTC served the Appellants with a complaint on the notes and the Appellants filed an answer on February 10, 1992. The RTC filed for summary judgement which, if

they prevailed, would free the RTC from their promises per the mortgage that were verified by Mellon, to face the defenses of the Appellants. The RTC did prevail and not only did they not have to face the general defenses of the Appellants they also did not have to face those defenses that were properly reflected in the banks records per 12 USC 1823 (e).

BASIS FOR FEDERAL JURISDICITION IN COURT OF FIRST INSTANCE

The Resolution Trust Corporation is an instrumentality of the United States established by 12 U.S.C. 1441a(b)(1)(A).

Under 12 U.S.C. 1441a (1) (1), any civil action to which the Resolution Trust Corporation is a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction over such

action.

By virtue of 28 U.S.C. 1331, the district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

ARGUMENT

It is an undisputable fact that the Enclave was an operating hotel prior to and for a period of time after the Appellants first visited and subsequently purchased two units. It is also an undisputable fact that the hotel operation was illegal. The Public Offering Statement, the brochure, the daily room rate schedule, the master deed and the live operating luxury hotel all served to mislead the Appellants into believing that the hotel was legal.

The hotel units were sold to the

Appellants by U.S. Capital who was the builder and also the lender. The Fannie Mae/Freddie Mac Mortgage forms that were supplied by the lender held that the lender or his successors and assigns had to notify the Appellants that they had the right to assert any defense to acceleration and foreclosure per paragraph (11) and (19) of the mortgage, shown below.

(11) **Successors and Assigns Bound: Joint and Several Liability; Co-signers.** The covenants and agreements of this Security Instrument shall bind and benefit the successors and assigns of Lender and Borrower,...

(19) **Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration.....The notice shall further inform**

Borrower of the .....right to assert in the foreclosure proceeding.....any other defense of Borrower to acceleration and foreclosure."

Also, in the mortgage form in the allotted space for the description of the property there was insufficient room for a detailed description, therein a reference is made to look to the Master Deed for a full description of the property, therefore incorporating the Master Deed into the mortgage. This Master Deed accompanied the mortgage when it was sold to Irving Saving and Loan and it is also recorded with the Atlantic County Clerk. The Master Deed States in the LEASING OF UNITS section that,

"There shall be no restrictions on the right of a unit owner to lease or rent his unit"

This clearly shows the intent of the Builder/Lender to re-enforce to the Appellants that the hotel was legal.

Paragraph (11) and (19) have contract terms that bind both the bank and the RTC. 12 USC 1823(e) states that the RTC will honor such properly recorded contract terms that bind the bank. In this situation the RTC is bound to these terms independent of whether or not the bank is because they are a successor and assign and per the mortgage they are bound.

Similarly the RTC is also bound per paragraph (11) and 12 USC 1823 (e) to the agreement of the Lender in the Lender produced Master Deed for the Appellants to have unrestricted rental rights.

These are the written contract terms and Article 1, section 10 of the Constitution and the Fifth Amendment speak clearly as to why these terms

must be kept by the RTC.

12 USC 1823(e) also speaks clearly to why these terms are valid and therefore legally binding on the RTC.

The D'Denche, Duhme, v. FDIC case and the Langley v. FDIC case both clearly state that an agreement properly reflected in the banks records is enforceable against the RTC and the agreements of this case are on the face of the mortgage, therefore they are enforceable against the RTC.

The Howell v. Continental Credit Corp. case contains a bilateral agreement that tends to diminish the rights of the RTC per terms on the face of the obligation, therefore as in the Howell case the agreements of the case at bar that are on the face of the mortgage which tend to diminish the rights of the RTC should also be enforceable.

From the above it seems clear why the

Constitution, the Fifth Amendment, statute 12 USC 1823(e) and common law doctrine mandate that the terms of the mortgage have to be followed by the RTC.

Congress made no provisions to protect the RTC from the bad business decisions of failed banks. They only made provisions to protect the depositors by creating the insurance fund.

In this case for the RTC to collect from a consumer for the mistake of the bank and the bank examiners is unconscionable.

In addition to the law, common sense would seem to dictate that the RTC is bound to the mortgage terms, some of the thinking being;

- The bank and bank examiners were aware of their promise to allow the consumer to assert any defense to acceleration and foreclosure.
- The bank and bank examiners were

aware that the mortgage servicer confirmed that the consumers had the right to assert their defenses.

- The bank and bank examiners were aware of the Consumers right to unrestricted rentals.
- The Bank and the bank examiners were not required to buy the mortgage from the builder. It was a mature business decision, prudently made.
- The purchase was made at a deep discount, indicating their awareness of the risk.
- The bank and bank examiners were defrauded by the builder, as were the consumers.
- The consumers protected themselves with the terms of the mortgage but the bank and examiner did not.
- The bank paid the builder who defrauded them, they did not pay

the consumers.

- The consumers have first claim to recoup their damages.
- The RTC must make claim against the builder who defrauded them, they have no claim, legal or moral against the innocent consumer.

Two independent defenses were presented to the courts, either of them allowing the Petitioners to prevail.

1) "The right to assert any defense" as stated in the Fannie Mae mortgage as a non uniform condition of the mortgage.

2) The agreement, providing for the units to be operated as hotel properties, which is properly reflected in the bank's records.

The courts by disallowing both defenses raised further questions, which they did not address:

1) If "the right to assert any

defense" means something else, what was the document that was signed? (In the Fraud in the Factum sense.)

2) Since the hotel units were not hotel units (an undisputed fact) how could the defense of fraud in the inducement be avoided by the RTC when they are bound by the agreements made by the builder/lender especially those contained in the mortgage documents.

The courts did not address these issues and their remedies, nor did they discuss the source, limitations, or application of the undefined power the RTC brought to bear on this litigation. Further, the courts failed to comment on their authority to enforce this unwritten power.

The fact that three Federal Groups (the RTC, the District Court of New Jersey

and the 3rd Circuit Court of Appeals) would unanimously feel that the Petitioners two independent defenses are without merit would appear to be an extremely improbable event, if in fact the Petitioners were correct.

The Petitioners feel strongly that the written law clearly and consistently supports their case and that the unanimity of their opposition is not the result of an improbable event, but is the result of an endemic problem in the system, such as an unwritten law i.e. "the RTC prevails".

If this was the case, a ruling in favor of the Petitioners would not only relieve them from the financial devastation and emotional despair brought on them by the perpetrators of the fraud and the U.S. Government, but probably save thousands of other citizens from a similar plight and send a signal to the courts that America is a law abiding country.

CONCLUSION

The Resolution Trust Corporation came into possession of the Petitioners mortgages which have terms that bind all subsequent holders to the covenants and agreements, of these mortgages, made by the original Lender. Each mortgage has on its face two independent agreements each which would allow the Petitioners to prevail. The Constitution, United States Law and Common Law Doctrine all require that the RTC abide by these agreements therefore, Peter R. Mick and Donald C. Beck respectfully request that a writ of certiorari issue to the United States 3rd Circuit Court of Appeals, so that its judgement and opinion may be reviewed and reversed.

Respectfully submitted,

P. Mick D. Beck

Peter Mick and Donald Beck

PRO SE

APPENDIX A

OPINION OF THE THIRD CIRCUIT COURT OF APPEALS

ISSUED APRIL 20, 1993

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 92-5556

RESOLUTION TRUST CORPORATION, CONSERVATOR FOR IRVING FEDERAL SAVINGS AND LOAN ASSOCIATION,

Appellee

v.

DONALD C. BECK;

PETER R. MICK,

Appellants-Defendants/

Third-Party Plaintiffs

v.

RESORT DEVELOPMENT CORPORATION;

U.S. CAPITOL CORPORATION;

U.S. CAPITOL MORTGAGE CORPORATION;

RESORT HOSPITALITY CORPORATION;

PATRICK L. TOMLIN;

RICHARD W. PAYTON;

WILLIAM HRISKO;

HELEN WISZNAT;

COMMONWEALTH LAND TITLE;

PERSKIE & NEHMAD,

Third-Party Defendants

(Newark New Jersey District Civil No. 91-05195)

RESOLUTION TRUST CORPORATION, CONSERVATOR FOR IRVING FEDERAL SAVINGS AND LOAN ASSOCIATION

v.

DONALD C. BECK;

U.S. CAPITAL MORTGAGE CORPORATION;

THE ENCLAVE CONDOMINIUM ASSOCIATION;

CAESAR BOARDWALK REGENCY;

MARINA ASSOCIATED, d/b/a HARRAH'S MARINA HOTEL AND CASINO;

ELSINORE SHORE ASSOCIATES, d/b/a ATLANTIS CASINO HOTEL;

PETER R. MICK,

Defendants/Third-Party Plaintiffs

v.

RESORT DEVELOPMENT CORPORATION;

RESORT HOSPITALITY CORPORATION;

U.S. CAPITAL CORPORATION;

WILLIAM HRISKO;

PATRICK L. TOMLIN

RICHARD W. PAYTON;

HELEN WISZNAT;

MELLON FINANCIAL SERVICES;

PERSKIE & NEHMAD, Counselors at Law,

Third-Party Defendants

(Newark New Jersey District Civil No. 92-00002)

RESOLUTION TRUST CORPORATION, CONSERVATOR FOR IRVING FEDERAL SAVINGS AND LOAN ASSOCIATION

v.

PETER R. MICK;

U.S. CAPITAL MORTGAGE CORPORATION;

THE ENCLAVE CONDOMINIUM ASSOCIATION;

CAESAR BOARDWALK REGENCY;

MARINA ASSOCIATED, d/b/a HARRAH'S MARINA HOTEL AND CASINO;

ELSINORE SHORE ASSOCIATES, d/b/a ATLANTIS CASINO HOTEL,

Defendants/Third-Party Plaintiffs

v.

RESORT DEVELOPMENT CORPORATION;

RESORT HOSPITALITY CORPORATION;

U.S. CAPITAL CORPORATION;

WILLIAM HRISKO;

PATRICK L. TOMLIN;

RICHARD W. PAYTON;

HELEN WISZNAT;

MELLON FINANCIAL SERVICES;

PERSKIE & NEHMAD, Counselor at Law,

Third-Party Defendants

(Newark New Jersey District Civil No. 92-

00003)

Appeal from the United States District Court for the District of New Jersey

District Judge:
Honorable Nicholas H. Politan

Submitted Under Third Circuit Rule 12(6)
April 7, 1993

Before: MANSMANN, ALITO and ALDISERT, Circuit Judges.

JUDGMENT ORDER

After consideration of all contentions raised by appellants, and considering Langley v. Federal Deposit Ins. Corp., 484 U.S. 86 (1987); D'Oench, Duhme & Co., Inc.

v. Federal Deposit Ins. Corp., 315 U.S. 447 (1942), and Adams v. Madison Realty & Dev. Inc., 937 F.2d 845 (3d Cir. 1991), it is ADJUDGED AND ORDERED that the judgement of the district court be and is hereby affirmed.

Costs taxed against the appellants.

BY THE COURT,

_____

Circuit Judge

Attest:

Acting Chief Deputy Clerk

DATED: April 20, 1993

APPENDIX B

OPINION OF THE UNITED STATES DISTRICT

COURT OF NEW JERSEY

ISSUED SEPTEMBER 1, 1992

NOT FOR PUBLICATION

September 1, 1992

LETTER OPINION AND ORDER

ORIGINAL ON FILE WITH CLERK OF THE COURT

Richard L. Zucker, Esq.
LASSER, HOCHMAN, MARCUS,
GURYAN AND KUSKIN
75 Eisenhower Parkway
Roseland, NJ 07068
Attorneys for Plaintiff

Frederick C. Biehl, III, Esq.
SORIANO, HENKEL, BIEHL,
MATTHEWS AND MARINELLOW, P.C.
314 Broad Street
Bloomfield, NJ 07003
Attorneys for Defendants
Peter R. Mick and Donald C. Beck

Raymond D. Bogan, Esq.
HRYMACK & BOGAN
501 American Legion Way
Point Pleasant Beach, NJ 08742
Attorneys for Consolidated-Plaintiff
Steven Melendez

Donald Brian Mark, Esq.
SLATER, TENAGLIA & HELMER, P.A.
26 West Main Street
Marlton, NJ 08053
Attorneys for Consolidated-Defendant
Marina Associated

Re: Resolution Trust Corporation,
Conservator for Irving Federal
Savings & Loan Association v.
Peter R. Mick, et al Civil
Action No. 91-5195
(consolidated)

Dear Counsel:

This matter comes before the court on plaintiff's and defendants' cross motions for summary judgement. The motions are decided without oral argument pursuant to Rule 78 of the Federal Rules of Civil Procedure. For the reasons outlined herein, plaintiff's motion is **GRANTED**, and defendant's motion is **DENIED.**

I. BACKGROUND

On June 25, 1986, defendants Peter Mick and Donald Beck executed two notes to the order of U.S. Capital Mortgage Corporation ("U.S. Capital"), each in the amount of $283,200. Monthly payments of principal and interest in the amount of $2,590.55 each were to be paid on the first day of each and every month commencing August 1, 1986, with a final balloon payment to be paid on July 1, 1996. (See Defense Exhibit A). To secure payment of the notes,

defendants executed and delivered to U.S. Capital, two mortgages of even date with the notes, and thereby conveyed in fee the premises described as Condominium Units 2001 and 1901 in the Enclave, a condominium located at the Boardwalk and Elberon Avenue, Atlantic City, New Jersey. The mortgages were executed on the condition that such conveyances would be void if payment was made according to the term of the note. The mortgages were recorded on July 24, 1986 in the Office of the Clerk of Atlantic City.

On or about July 3, 1986, U.S. Capital executed an assignment of the mortgages in favor of Irving Savings and Loan Association ("Irving"), which assignment was recorded on August 8, 1986, in the Office of the Clerk of Atlantic County. Contemporaneously with the execution of the assignment of the mortgages, U.S. Capital endorsed the notes to the order of

Irving as evidenced by page 2 of the note. (see attachment to Defendants' Brief in Support of Summary Judgement.)

Defendants made the monthly payments of principal and interest from August 1, 1986 through September 1, 1988. Commencing October 1, 1988, However, defendants ceased making any monthly payments under the notes and mortgages.

On February 8, 1990, Irving commenced a foreclosure suit in the Superior Court of New Jersey, Chancery Division, Atlantic County, Docket #F-1774-90.[1]

On January 17, 1991, the Office of Thrift Supervision (OTS) appointed plaintiff Resolution Trust Corporation ("RTC") as receiver of Irving. The receiver took possession of Irving and succeeded to all of the rights, titles,

[1] The foreclosure actions were removed to this court on January 2, 1992, under Civil Action Numbers 92-2 and 92-3

powers and privileges of Irving. On that same day a new federal savings bank, Irving Federal was chartered by the OTS to accept the assets and assume the liabilities of Irving. RTC was appointed as conservator for the new bank. Also on that same day, RTC as receiver for Irving, entered into a purchase and assumption agreement (P & A) with Irving Federal. Under that agreement, Irving Federal acquired assets from Irving. Among the assets acquired were the notes and mortgages which are the subject of the three litigations before this court.

On November 21, 1991, RTC, as conservator for Irving Federal, commenced an action in this court (91-5195) on the two notes. As of June 1, 1992, the total amount due on the notes was $834,334.17. The foreclosure actions were removed to this court on January 2, 1992, under Civil Action Numbers 92-2 and 92-3.

Defendants deny liability on the notes by reason of Irving's alleged involvement with U.S. Capital and others in fraudulent conduct relating to the defendants' purchase of the two condominium units. Specifically, defendants allege that those parties made certain representations about the Enclave which they considered material to their purchasing the units, i.e., that plaintiff expressly and impliedly warranted to defendants that the Enclave units purchased by defendants were legally capable of occupancy as hotel units. However, the defendants have failed to demonstrate, and this court's examination of the record has failed to uncover, that these alleged representations/warranties were contained in the notes or mortgages executed by defendants in their negotiations with plaintiff.

The RTC asserts that the claims of Beck and Mick of fraud in the inducement

as alleged in their separate defense and counterclaims fall within the purview of 12 U.S.C. 1823(e) and the D'Oench, Duhme doctrine, and thus cannot be successfully asserted against the RTC.

Nevertheless, the defendants argue that because the loan documents meet the four part exception to the test under 12 U.S.C. 1823 (e), and the loan documents themselves state that the defendants are entitled to "assert their claims or defenses against the holder," then the RTC is not entitled to summary judgement. Defendants alternatively argue that the loan documents that they executed were qualified and conditional obligations and, as such, lie outside the scope of the D'Oench, Duhme doctrine. Lastly, defendants argue that summary judgement is premature because they have not had a sufficient amount of time to conduct discovery.

Accordingly, the resolution of these motions requires an examination of the scope and underlying policies of 12 USC 1823(e) and the interaction of that statute with the D'Oench, Duhme doctrine.

II DISCUSSION

A. STANDARD OF REVIEW

Summary Judgement is appropriate when "the pleading, depositions, answers to interrogatories, and admissions of file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law. "Fed.R.Civ.P.56 (c).

The plain language of R.56 (c) mandates the entry of summary judgement, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that

party's case, and on which that party will bear the burden of proof at trial. In such a situation there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. The moving party is entitled to a judgment as a matter of law because the nonmoving party has failed to make a sufficient showing on an essential element of his case with respect to which he has the burden of proof.

Celotex v. Catrett, 477 U.S. 317,323-24 (1986).

The moving party bears the initial responsibility of stating the basis for its motion and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact. Id. at 323.

He can discharge that burden by

"showing..... that there is an absence of evidence to support the non-moving parties case." Id. 323,325.

Issues of fact are "genuine only if a reasonable jury, considering the evidence presented, could find for the non-moving party." Childers v. Liberty Lobby, Inc. 842 F.2d 689,694 (3rd Cir. 1988), citing Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 249. Material facts are those which will affect the outcome of the trial under governing law. Anderson, 477 U.S. at 248. In determining when an issue of material fact exists, the court must consider all evidence in the light most favorable to the non-moving party. White v. Westinghouse Electric Company, 862 F.2d 56,59 (3rd Cir. 1988).

B. DEFENDANTS' MOTION FOR SUMMARY JUDGEMENT

The RTC contends that the common law

doctrine established in D'Oench, Duhme & Co. v. FDIC, 315 U.S.447 (1942), and provisions of 12 USC 1823 (e) preclude the defendants (obligers) on the two notes from asserting a claim or defense against the RTC that is based upon an undisclosed agreement or condition not reflected in the loan records of a depository's files.

"[F]ederal Common law has long prevented borrowers from raising 'secret agreements' in defense to actions to enforce ostensibly unconditional obligations they owe to a bank" that a governmental body has been compelled to step in and take over. Adams v. Madison Realty & Development, Inc., 937 F.2d 845,851 (3d Cir. 1991). In Adams, the Third Circuit, explaining D'oench, Duhme, stated that the rule emerging from the seminal case is that, "no agreement between a borrower and a bank which does not plainly appear on the face of an

obligation or in the bank's official records is enforceable against the FDIC." ID. at 852. The Court of Appeals further found that this doctrine was applicable to the RTC.

Both D'oench and 1823 (a) have been applied to effectuate the public policy interest in not enforcing "secret agreements" against the RTC when it is carrying out its statutorily mandated duties to protect depositors. If the RTC is unable to rely on the accuracy of the records of a failed bank, they will not be able to carry out their duties efficiently. Thus, by requiring all "agreements" to be written, Congress ensured that a bank's records would be complete when an insolvent bank is taken over by the RTC, so that "mature consideration" may be made of loan transactions. Adams, 937 F.2d at 958. Therefore, even if the bank examiners have

actual knowledge of a defense to a loan or claims based therein, unless the agreement on which the defense or claims is based meets the requirement of section 1823 (e), it cannot be asserted against the RTC. Id.

In Langley v. Federal Deposit INS. Corp., 484 U.S. 86, 92 (1987), Justice Scalia, writing for the majority, defined "agreement" as used in section 1823 (e) to include all of the conditions on performance which were a part of the original bargain. To support this definition of an agreement, Justice Scalia cited to Farnsworth who said that "promises, which impose duties, and conditions, which make duties conditional, are the main components of agreements." Id. at 94. The Langley court held that fraudulent misrepresentations alleged to have induced the execution of a promissory note constituted an "agreement" that could

not diminish the FDIC's interest in acquired assets unless the agreement satisfied each requirement under section 1823 (e). Id. at 86. Since the plaintiff's agreement in that case was not reflected in the records of the bank in accordance with 1823 (e), the plaintiffs could not assert their claim of fraud in the inducement against the FDIC.

In Adams the Third Circuit noted that the Langley court's interpretation of the word "agreement" in 1823 (e) "was consistent with D'Oench, Duhme," because

> one who signs a facially unqualified note subject to an unwritten and unrecorded condition upon its repayment has lent himself to a scheme or arrangement that is likely to mislead the baking authorities, whether the condition consists of performance of a counterpromise or of the truthfulness of a warranted fact.

Adams, 937 F.2d at 854-854. Accordingly, courts have continuously rejected attempts by obligers who seek to prevent enforcement of their obligations by asserting separate, secret, unrecorded agreements. See generally, D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1942); Langley v. FDIC 484 U.S. 86 (1987);Adams v. Madison Realty & Development, Inc.937 F.2d 845 (3d Cir. 1991); Federal Savings & Loan Corp. v. Murray, 853 F.2d 1251 (5th Cir. 1988).

Defendant's primary argument is that because the loan documents themselves state that the defendants are entitled to "assert their claims with defenses against the holder," then the loan documents meet the four criteria under 1823 (e). In opposition, plaintiff argues that this contention is "an illogical form of circular tautology that misses the essential point of the D'oench, Duhme

doctrine and simply proves too much." I agree.

As a general rule, the D'oench, Duhme doctrine stands for the proposition that once the RTC has taken control of the assets of a bank, then the basis of any claims or defenses that a party has against the RTC must meet the four criteria of the doctrine as codified in 12 U.S.C. 1823 (e). That section provides in full, as follows:

> No agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the corporation unless such agreement-

(1) is in writing,

(2) was executed by the depository institution and any person claiming a adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,

(3) was approved by the Board of Directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said Board or Committee, and

(4) has been, continuously, from the time of its execution, an official record of the depository institution.

12 U.S.C. 1823 (e) (emphasis supplied).

After thoroughly examining all of the

loan documents, I find that the defendants have failed to satisfy the requirements of 1823 (e). Defendants contend that they have satisfied the writing requirement under section 1823 (e) by drawing the court's attention to the boilerplate language of the mortgages which states that they are allowed to assert claims or defenses in a foreclosure proceeding. If I applied the statute as defendants suggest, then I would eviscerate the rule itself and turn the D'oench, Duhme doctrine on its head.

In this case, there is absolutely no evidence that the alleged representations are included in the loan documents, In fact, the certifications executed by defendants allege that they were somehow defrauded by **oral representations** by the developer of the property and its subsidiary, U.S. Capital Mortgage Corporation. To this end, the Court of

Appeal in Adams appropriately stated:

> the omission from the written loan agreement of any material term of the loan that would tend to diminish the original loan is inimical to the prophylactic purpose of D'Oench, Duhme and the general Congressional purpose of full and continuous disclosure evidenced in 1823 (e).

Id. at 427.

Moreover, defendants missed the mark on Langley's construction of the work "agreement" in 1823 (e). An "agreement" includes any warranty on which the performance of a party is conditioned. In their certifications, the defendants claim that the people who sold them the condominium units made a variety of representations about the Enclave which they considered material to their purchase of the units. For example, defendants

alleged that the developers of the property and US Mortgage Corporation expressly and impliedly warranted to defendants that the Enclave units purchased by defendants were legally capable of occupancy as hotel units. Defendants also detail several other specific representations and warranties which plaintiffs have allegedly breached.

Just as in Adams, "these representations and warranties are promises, the truth of which are conditions precedent to the defendants' obligations to repay the notes." Adams, 937 F.2d at 857. Under the Langley decision, they are "agreements" that fall within 1823 (e). Since the basis of defendants Beck and Mick's defenses are oral representations, they inherently fail to meet the criteria of 1823 (e). Defendants should have insured that the alleged representations were incorporated

into the loan documents if they intended to rely upon them. Indeed, these are the precise types of "secret agreements" that the D'Oench, Duhme doctrine was designed to prevent from being asserted against the RTC.

Thus, plaintiff correctively notes that, under the Third Circuit's decision in Adams, defendants' claims of fraud in the inducement fall within the purview of the D'Oench, Duhme doctrine and 1823(e) and, therefore, cannot be asserted against the RTC.

In the alternative, defendants argue that the provisions of the D'Oench, Duhme doctrine do not apply to the loan documents at issue here because "a borrower may assert defenses where the notes are conditional." Def. Br.at 7.

In support of their argument, defendants claim that paragraphs 11 and 19

of the mortgages, read separately or in conjunction with one another, render the notes "conditional." Defendants further claim that the language contained in paragraph 10 of the notes is conditional as that term is defined under New Jersey law.

Paragraph 11 provides in part: "the covenants and agreements of this Security Instrument shall bind and benefit the successors and assigns of Lender and Borrower..." Def.Ex.B. The defendants' argument that this language renders the notes conditional is without merit. The mere fact that paragraph 11 binds and benefits successors and assigns in no way renders the mortgages conditional under New Jersey Law. See, N.J.S.A. 12A:3-104 (stating that whether a note is conditional or unconditional is only relevant if it affects defendants' obligation to pay the amount due under the

notes.)

Paragraph 19 provides in part:

> the notice shall further inform Borrower of the right to reinstate after acceleration and the right to assert in the foreclosure proceeding the nonexistence of a default or any other defense of Borrower to acceleration and foreclosure.

Def.Ex.B.

Paragraph 10 of the notes provides in part as follows:

> That security Instrument describes how and under what conditions I may be required to make immediate payment in full of all amounts I owe under this note. Some of those conditions are described as follows:
>
> ...Lender may, at its option, require immediate payment in full of all sums secured by this Security

> Instrument... If Lender exercises this option, Lender shall give Borrower notice of acceleration...

Def.Ex.A.

I have carefully reviewed the language contained in paragraphs 10,11,and 19 set forth above. I find that nowhere is there a reference, either directly or indirectly, to a promise or condition of repayment which is based upon defendants ability to utilize the condominium units as a hotel.

Based on these boilerplate clauses, defendants ask the court to permit them to assert a defense of fraud in the inducement which is based on an oral agreement. This leap in logic ignores the basic requirements under 1823 (e) and the D'Oench, Duhme doctrine, namely that any agreement which tends to diminish the RTC's interest or which renders the notes

conditional, must be in writing. Defendants's circular reasoning fails to address an essential element under 1823 (e), that element being the written agreement.

Accordingly, if I were to allow defendants to ultimately raise this oral agreement through the smokescreen of the boilerplate language in paragraph 19 of the mortgages, then I would have to ignore both the letter and spirit of the law under 12 USC 1823 (e) and the D'Oench, Duhme doctrine.

In the final analysis, defendants can not escape the fact that there is no language whatsoever in paragraphs 10, 11, or 19 which states that defendants' obligation to repay the notes is conditioned on an agreement that the condominium units were capable of occupancy as hotel units.

Defendant's final argument is that

summary judgment is premature because they have not had a sufficient amount of time to conduct discovery. In support of this argument, defendants claim that as a matter of law they are entitled to and must review the banks official records to properly reply to the plaintiff's motion for summary judgement.

The court agrees with plaintiff that further discovery would not enable the defendants to avoid summary judgement. In their certifications, defendants claim that they were somehow defrauded by **oral representations** by the developer of the property and its subsidiary US Capital Mortgage Corporation. However, as the Court previously emphasized, these alleged representations, which constitute an "agreement", are not contained in any of the loan documents. As the Third Circuit opined in Adams, "the rule emerging for D'Oench, Duhme is that no agreement which

does not plainly appear on the face of an obligation or in the bank's official records in enforceable against the [RTC]." Adams, 937 F.2d at 852. Indeed, the defendants fail to satisfy the requirements of 1823 (e) because the alleged representations are not in writing. Thus, any further discovery would not disclose any information that would prevent summary judgment in favor of plaintiff.

Moreover, defendants have had two years to conduct discovery from the time plaintiff filed the foreclosure suits on February 8,1990, until Magistrate Hedges stayed discovery on March 25,1992. Thus, I conclude that defendants had sufficient time to conduct discovery.

III. CONCLUSION

In sum, the court finds that plaintiff

has discharged its burden by showing that there is an absence of a genuine issue of material fact and that plaintiff is entitled to judgment as a matter of law. Accordingly, summary judgement is hereby granted in favor of plaintiff and against defendants with respect to plaintiff's action against Beck and Mick on the notes and on the foreclosure actions. Although numerous third party claims against various third party defendants remain open in this civil action, I see no just reason to delay the entry of a final judgment in favor of the RTC and against defendants Beck and Mick. See Fed.R.Civ.P.54(b). Accordingly, I will grant plaintiff's request to certify final judgement in this action with respect to plaintiff's claims against Beck and Mick. Counsel for plaintiff is hereby directed to submit appropriate orders of final judgment pursuant to Rule 54(b) with respect to

plaintiff's action against defendants on the notes and on the foreclosure actions. These orders should reflect the total amount of principal and interest due and owing under the notes as of the date of entry of final judgment under Fed.R.Civ.P.54 (b).

SO ORDERED:
Nicholas H. Politan
U.S.D.J.

APPENDIX C

FINAL JUDGEMENT OF THE UNITED STATES DISTRICT COURT OF NEW JERSEY DATED OCTOBER 14, 1992

LASSER, HOCKMAN, MARCUS, GURYAN AND KUSKIN
75 Eisenhower Parkway
Roseland, New Jersey 07068
(210)226-2700
Attorneys for Plaintiff

Filed October 14, 1992
Entered October 19,1992

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

RESOLUTION TRUST CORPORATION
CONSERVATOR FOR IRVING FEDERAL SAVINGS
AND LOAN ASSOCIATION

Plaintiff,

vs.

Civil Action No.
91-5195

PETER R. MICK et al.,

FINAL JUDGEMENT
FOR FORECLOSURE

Defendants

This matter being opened to the Court (Honorable Nicholas H. Politan presiding) on May 26, 1992, and the Court having

considered the submissions of the parties and the arguments of counsel and being satisfied that good cause exists for the entry of the within order,

It is on this 14th day of October, 1992

ORDERED that:

1. The plaintiff is entitled to have the sum of $426,835.79, together with lawful interest thereon to be computed as of September 21, 1992, thereafter at a per diem rate of $86.36 until date of final judgement, together with costs of this action to be taxed including a counsel fee of $4,418.35, raised and paid out of the mortgaged premises described in the Complaint:

2. The mortgaged premises be sold to raise and satisfy the several sums of moneys due the plaintiff and that an execution issue for that purpose to the United States Marshall, commanding him to

make sale according to law of the mortgaged premises and out of the moneys arising from said sale that he first pay the plaintiff's debt, with interest therein and costs as aforesaid, to the plaintiff or its attorneys, and that case more money shall be raised by said sale as shall be sufficient to answer such several payments, that the surplus be brought into Court to abide the further order of the Court, and that the Marshall make his report of the said sale as required by law:

3. The defendants, and each of them, stand absolutely debarred and foreclosed of and from all equity of redemption of, in and to said mortgaged premises as shall be sold as aforesaid by virtue of this judgement;

4. The plaintiff and any purchaser under the foreclosure sale duly recover against defendants Donald C. Beck and

Peter R. Mick and all parties holding by, through or claiming under them, possession of the premises mentioned and described in the Complaint, with the appurtenances, and that a writ of possession issue thereon; and

5. Pursuant to Rule 54(b), there is no just reason for delay, and the entry of final judgment be, and it hereby is, expressly directed.

NICHOLAS H. POLITAN, U.S.D.C.J.

APPENDIX D

FINAL JUDGEMENT OF THE UNITED STATES DISTRICT COURT OF NEW JERSEY DATED SEPTEMBER 23 1992

LASSER, HOCKMAN, MARCUS, GURYAN AND
KUSKIN
75 Eisenhower Parkway
Roseland, New Jersey 07068
(210)226-2700
Attorneys for Plaintiff

ENTERED SEPTEMBER 28,1992
FILE SEPTMBER 23, 1992

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

RESOLUTION TRUST CORPORATION
CONSERVATOR FOR IRVING FEDERAL SAVINGS
AND LOAN ASSOCIATION

Plaintiff,

vs.

Civil Action No.
91-5195

DONALD C. BECK et al.,

FINAL JUDGEMENT
FOR FORECLOSURE

Defendants

This matter being opened to the Court (Honorable Nicholas H. Politan presiding) on May 26, 1992, and the Court having considered the submissions of the parties and the arguments of counsel and being satisfied that good cause exists for the entry of the within order,

It is on this 23rd day of September, 1992

ORDERED that:

1. The plaintiff is entitled to have the sum of $426,839.66, together with lawful interest thereon to be computed as of September 21, 1992, thereafter at a per diem rate of $86.34 until date of final judgement, together with costs of this action to be taxed including a counsel fee of $4,418.40, raised and paid out of the mortgaged premises described in the Complaint:

2. The mortgaged premises be sold to raise and satisfy the several sums of

moneys due the plaintiff and that an execution issue for that purpose to the United States Marshall, commanding him to make sale according to law of the mortgaged premises and out of the moneys arising from said sale that he first pay the plaintiff's debt, with interest therein and costs as aforesaid, to the plaintiff or its attorneys, and that case more money shall be raised by said sale as shall be sufficient to answer such several payments, that the surplus be brought into Court to abide the further order of the Court, and that the Marshall make his report of the said sale as required by law:

3. The defendants, and each of them, stand absolutely debarred and foreclosed of and from all equity of redemption of, in and to said mortgaged premises as shall be sold as aforesaid by virtue of this judgement;

4. The plaintiff and any purchaser under the foreclosure sale duly recover against defendants Donald C. Beck and Peter R. Mick and all parties holding by, through or claiming under them, possession of the premises mentioned and described in the Complaint, with the appurtenances, and that a writ of possession issue thereon; and

5. Pursuant to Rule 54(b), there is no just reason for delay, and the entry of final judgment be, and it hereby is, expressly directed.

NICHOLAS H. POLITAN, U.S.D.C.J.

APPENDIX E

FINAL JUDGEMENT OF THE UNITED STATES DISTRICT COURT OF NEW JERSEY

DATED OCTOBER 21, 1992

LASSER, HOCKMAN, MARCUS, GURYAN AND KUSKIN
75 Eisenhower Parkway
Roseland, New Jersey 07068
(210)226-2700
Attorneys for Plaintiff

Filed October 21, 1992
Extended October 22,1992

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

RESOLUTION TRUST CORPORATION
CONSERVATOR FOR IRVING FEDERAL SAVINGS AND LOAN ASSOCIATION

Plaintiff,

vs.

Civil Action No. 91-5195(NHP)

DONALD C. BECK et al.,

FINAL JUDGEMENT FOR FORECLOSURE

Defendants.

This matter being opened to the Court (Honorable Nicholas H. Politan presiding)

on May 26, 1992, and the Court having considered the submissions of the parties and the arguments of counsel and being satisfied that good cause exists for the entry of the within order,

It is on this 21st day of October, 1992.

ORDERED that:

1. Final judgement be, and it hereby is, entered in favor of plaintiff Resolution Trust Corporation, receiver of Irving Federal Savings and Loan Association, and against defendants Donald C. Beck and Peter R. Mick in the amount of $853,675.45, plus attorney fees in the amount of $7,305.00 and disbursements in the amount of $264.18, for a total judgment of $861,244.63 and

2. Pursuant to Rule 54(b), there is no just reason for delay, and the entry of final judgment be, and hereby is, expressly directed. (NHP, U.S.D.C.J.)